Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1998

FRANK E. EVERETT, III,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.) Whether the court below erred by deferring to the agency's case-by-case interpretation of the agency's own vague regulation, thereby upholding the agency's making of law through adjudication rather than the more cumbersome rulemaking process?

2.) Whether the court may use ordinary rules of construction, including established agency practice, to interpret a regulation, or whether the court is required to defer to the meaning ascribed to the regulation by mid-level employees of the Forest Service?

3.) Whether judicial deference to an agency's construction of its own regulation violates a core structural component of our constitutional scheme – the separation of powers doctrine?

PARTIES TO THE PROCEEDING

Petitioner, Frank E. Everett, III, is a private citizen who owns a vacation home next to the Sawtooth National Forest. Petitioner was plaintiff in the district court and appellant in the court of appeals. Respondents, the United States of America, the United States Department of Agriculture, and the United States Forest Service, were defendants in the district court and appellees in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Frank Everett respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (App., *infra*, 1a - 11a) from which review is sought is reported at 158 F.3d 1364 (D.C. Cir. 1998). The decision of the court of appeals denying rehearing (App., *infra*, 12a) is unreported. The decision of the United States District Court for the District of Columbia granting respondents' motion for summary judgment and denying petitioner's motion for summary judgment (App., *infra*, 13a - 27a) is reported at 980 F. Supp. 490 (D.D.C. 1997).

JURISDICTION

The court of appeals entered its initial judgment and decision on October 30, 1998. (App., *infra*, 1a) The court of appeals thereafter denied petitioner's motion for rehearing on

January 6, 1999. (App., *infra*, 12a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Reprinted in an appendix to this petition (App., *infra*, 28a - 30a) are the pertinent provisions of the United States Forest Service regulations, 36 C.F.R. §§ 251.50(a) and (c), and the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 553(b) and (c).

STATEMENT OF THE CASE

1. This case arises out of multiple, inconsistent interpretations of the special use permit regulations put forward by respondent's many Forest Supervisors and District Rangers, and the conclusion of the court below that deference was required to these irreconcilable interpretations affecting use of national forest land. The national forest system encompasses 191 million acres of land, an area equivalent to the state of Texas. Denver James, *Meet the Forest Service* (visited Mar. 16, 1999) <http://www.fs.fed.us/intro/meetfs2.html>. Described by the U.S. Forest Service as

"America's Great Outdoors," recreation facilities in the national forests can accommodate nearly 2 million people at one time, and receive 835 million visits per year. *Id.*; David Unger, *The Future of Public Lands* (visited Mar. 16, 1999) <http://www.fs.fed.us/intro/speech/stvsfed.htm>. The mountains, streams, and fields of the national forest are criss-crossed by 121,000 miles of trails and 7,000 miles of scenic byways. *Id.*

The Secretary of Agriculture has adopted a regulatory scheme for the national forests which designates *all* uses of the forest as "special uses," requiring a special use permit. The regulation at issue in this case states: "[a]ll uses of National Forest System lands . . . are designated 'special uses.' Before engaging in a special use, persons . . . must obtain a special use authorization . . . ." 36 C.F.R. § 251.50 (a) (1999). However, the millions of Americans who visit the national forests each day need not obtain a permit for noncommercial, recreational uses, for subsection (c) of the same regulation exempts from the special use authorization

requirement any "noncommercial recreational activities such as camping, picnicking, hiking, fishing, hunting, horseback riding, and boating . . . ." 36 C.F.R. § 251.50(c) (1999). The Secretary has issued no interpretation of which noncommercial recreational activities are similar enough to hiking, camping, horseback riding, picnicking, and boating to come within this permit exception. In the court below, however, respondent admitted that the landing of seaplanes, as well as the operation of motorcycles, snowmobiles, and off-road vehicles fall within the exception. (App., *infra*, 22a) Respondent also admitted to the district court that no special use permit had ever before been required of noncommercial, recreational helicopter use. *Id.*

2. This lawsuit arose out of a dispute between petitioner and respondent as to whether or not a special use permit was required for him to make noncommercial, recreational use of his personal helicopter in the Sawtooth National Forest in Idaho. The answer to that issue turns on whether the court may use ordinary rules of construction,

including established agency practice, to interpret the regulation, or whether the court is required to defer to the meaning ascribed to the regulation by mid-level employees of the Forest Service.

On October 16, 1994, petitioner's neighbor complained to the Ketchum Ranger Station of the Forest Service about petitioner's landing his helicopter on Sawtooth land within the National Forest System ("NFS"). Ten days later, District Ranger Alan S. Pinkerton prepared a memorandum to the Supervisor of the Sawtooth Forest urging the issuance of an order barring the landing of aircraft, including helicopters, in the Sawtooth National Forest without a special use permit. (App., *infra*, 3a) Expressing concern about the "potential for uncontrolled use of private aircraft" in the Forest, Pinkerton explained that he had consulted with other district rangers who agreed that "the entire Forest should have control of this type of activity" and he stated that "in the near future we anticipate this protection to be addressed in the Forest Travel Plan." (Memorandum to

Forest Supervisor Jack E. Bills from District Ranger Alan S. Pinkerton, dated Oct. 25, 1994) In the meantime, he urged the Forest Supervisor to sign an order barring aircraft landing without a special use permit.

On November 2, 1994, Sawtooth Forest Supervisor Jack E. Bills issued the requested order prohibiting the "[l]anding of aircraft, or dropping or picking up any materials, supplies, or person by means of aircraft, including helicopters" without a special use permit. (App., *infra*, 4a) Petitioner challenged the order, which purported to change existing regulations, as a violation of the Administrative Procedure Act ("APA") because it imposed a special use permit requirement where none had previously existed, without complying with the requisite notice and comment rulemaking procedure. At a hearing on cross-motions for summary judgement, U.S. District Judge Emmett Sullivan urged respondent to withdraw the order, stating:

> Everyone in this country is affected. Everyone's activities in this park, in this forest, are somewhat limited because of this,

> and the public does not even know about this, because there's been no publication. No one has had an opportunity to comment. That's why it's a federal issue. . . .Why force me to determine whether there's a need for public comment, whether this was tantamount to the enactment of a rule without notice to the public, to the 200 million citizens of this country?

(Transcript of Motion Hearing Before the Honorable Emmet G. Sullivan, United States District Judge, at 47, 49 (No. 95-769) (August 1, 1996)). On August 27, 1996, respondent withdrew the order. (App., *infra*, 5a)

However, respondent then informed the district court judge that it now believed that existing regulations had all along prohibited helicopter use without a permit because helicopters were not like seaplanes, snowmobiles or other vehicles whose use is similar enough to hiking, camping, picnicking, boating and horseback riding to be exempt from the permit requirement. Respondent admitted that other Forest Service employees interpreted the regulation

differently, but claimed that this was within their "discretion" over the land within their authority.[1]

The court below affirmed, deciding that it must defer to the current interpretation of the Forest Service's special use regulations put forward in this case, and ignore the inconsistent interpretations in other national forests—and even in the earlier proceedings in this case. (App., *infra*, 11a) Rehearing was denied on January 6, 1999. (App., *infra*, 12a)

REASONS FOR GRANTING THE WRIT

I. This Case Affords This Court An Opportunity To Revisit the *Seminole Rock* Rule, a Rule That Has Caused A Split Among the Circuits and Which Has Been Questioned By Six Justices of This Court.

In 1945 this Court announced its foundational rule of judicial deference to an agency's interpretative rulemaking. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414

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[1] Defendants' Supplemental Brief In Support of Its Motion for Summary Judgment at 8, *Everett v. United States* (No. 95-0769) (filed in the United States District Court for the District of Columbia on Oct. 1, 1996).

(1945).[2] *Seminole Rock* involved an agency's interpretation of a regulation that it had promulgated pursuant to the Emergency Price Control Act of 1942, a law that was enacted in order to control inflation during World War II:

> The problem in this case is to determine the highest price respondent charged for crushed stone during March, 1942, within the meaning of Maximum Price Regulation No. 188. Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. *But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.*

Seminole Rock, 325 U.S. 410, 413-414 (1945) (emphasis supplied).

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[2] In 1984, this Court announced the modern principle that a court must defer to a reasonable interpretation of an ambiguous statute offered by the agency charged with administering the statute. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *reh'g denied*, 468 U.S. 1227 (1984).

While the *Seminole Rock* deference rule was formulated to address the practical question of whether the court (rather than the agency) was best positioned to engage in the accounting of whether the price of crushed stone was too high, its continued relevance in light of the passage of the APA, the levithan growth of agency rulemaking, and its tension with the separation of powers doctrine is today in question. Indeed, these concerns have caused six Justices of this Court to question the continued viability of the rule. In *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994), a regulatory interpretation case, Justice Thomas, joined by Justices Stevens, O'Connor, and Ginsburg, in dissent sharply criticized *Seminole Rock*'s underpinnings:

> It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome

> rulemaking process. Nonetheless, agency rules should be clear and definite so that affected parties might have adequate notice concerning the agency's understanding of the law. . . . "An agency whose powers are not limited either by meaningful statutory standards or . . . legislative rules poses a serious potential threat to liberty and to democracy."

Thomas Jefferson Univ., 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) (quoting 2 K. DAVIS & R. PIERCE, ADMINISTRATIVE LAW § 11.5, at 204 (3d ed. 1994).

A year later, in another regulatory interpretation case, *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87 (1995), Justice O'Connor, joined by Justices Scalia, Souter, and Thomas, dissented again, raising questions about the wisdom of continuing adherence to *Seminole Rock*:

> Nevertheless, the statute clearly contemplates that the Secretary will state the applicable reimbursement methods in regulations--including default rules that cover a range of situations unless and until specific regulations are promulgated to supplant them with respect to a particular type of cost. Indeed, despite the Court's suggestion to the contrary, . . . only

> by employing such default rules can the Secretary operate the sensible, comprehensive reimbursement scheme that Congress envisioned. Otherwise, without such background guidelines, providers would not have the benefit of regulations establishing the accounting principles upon which reimbursement decisions will be based, and administrators would be free to select, without having to comply with notice and comment procedures, whatever accounting rule may appear best in a particular context (so long as it meets minimum standards of rationality).

Guernsey Memorial Hospital, 514 U.S. 87, 103-104 (1995) (O'Connor, J., dissenting).

Moreover, lower courts are split on the issue of whether there is a continuing need for binding deference to agency interpretative rulemaking. For example, the Fourth Circuit has adhered to the deference standard, holding that the court must uphold an agency's interpretation so long as it is not "nonsensical." *Hoechst Celanese Corp. v. United States*, 128 F.3d 216 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 2367 (Jun. 26, 1998). Similarly, the First Circuit has applied a not "mindless, or whimsical" standard of agency review, *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104,

110 (1st Cir. 1997), and the Seventh Circuit has stated that the normal practice is to defer to agency interpretations of their own rules "in all but extraordinary cases." *Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 411 (7th Cir. 1987).

In sharp contrast, the Sixth Circuit has simply refused to enforce the deference standard which has become a legal "quicksand":

> Of course, no court has stated how to determine which interpretations of a statute are "reasonable, consistent, and persuasive" and which are not. So, after all these years of debate and after much judicial ink has been spilled, we are back to essentially the old rule that courts are not bound by agency interpretations of law and that courts are to apply laws based on the court's interpretation of the law's reasonable meaning. This entire process, travelling far without going anywhere, could have been avoided if the executive branch were left to enforce the law and the judicial branch were left to interpret the law.

Ohio State Univ. v. Secretary, United States Dep't of Health and Human Services, 996 F.2d 122, 124 n.1 (6th Cir. 1993), *cert. granted, vacated on other grounds*, 512 U.S. 1231

(1994). Similarly, the D.C. Circuit has concluded that as a result of the deference rule, agencies write "mush" and then give that "mush . . . concrete form only through subsequent less formal 'interpretations.'" *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 584 (D.C. Cir. 1997), *cert. denied*, 118 S.Ct. 1184 (Mar. 9, 1998).

Hence, review by this Court is necessary to resolve this split among the circuits and to address the serious concerns about the *Seminole Rock* rule raised by six Justices of this Court.

II. This Case Affords The Court An Opportunity to Adopt an Appropriate Rule of Deference toward Agency Interpretative Rulemaking That Is Consistent the Separation of Powers Doctrine.

The landmark decision in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *reh'g denied*, 468 U.S. 1227 (1984), rests in part on the practical premise that agencies have superior expertise which Congress is entitled to rely upon in the enactment of statutes that delegate to agencies the role of fleshing out through

interpretative regulations. However, the constitutional heart of *Chevron* consists of appropriate judicial deference to legislative enactments in the separation of powers doctrine.[3] *See, e.g., Auer v. Robbins*, 519 U.S. 452, 457 (1997) ("Because Congress has not 'directly spoken to the precise question at issue,' we must sustain the Secretary's approach so long as it is 'based on a permissible construction of the statute.'" (quoting *Chevron*, 467 U.S. at 842-843)). The *Seminole Rock* rule, however, ignores the separation of powers requirement:

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[3] "Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices--resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities. . . The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'" *Chevron*, 467 U.S. at 865-866 (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)).

> *Seminole Rock* ignores another critical structural feature of the Constitution – the separation of powers. After independence, many state constitutions had in form adopted a separation of powers, but had in fact left the executive and judiciary dependent on the legislature. In the years preceding the Philadelphia Convention, many of those governments behaved in ways that inspired the conviction that "We the people" (i.e., legislatures) were capable of tyranny and excess. By 1787, Americans widely understood that even representative government could result in tyranny if governmental power were concentrated and unchecked. They accepted that a "dependence on the people is, no doubt, the primary control on the government; but experience ha[d] [also] taught . . . the necessity of auxiliary precautions." In short, representative democracy, if unaccompanied by an effective separation of powers, insufficiently protected liberty.

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 640-641 (1996) (quoting The Federalist No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961)).

This Court has traditionally invalidated enactments which depart in any way from the form of government

proscribed by the Constitution, because "the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992). However, the framers of our Constitution could not have anticipated how the leviathan growth of agencies would threaten to destroy the framework for liberty they so carefully constructed by allocating powers among the three branches of government:

> Virtually every part of the government Congress has created . . . exercises all three of the governmental functions the Constitution so carefully allocates among Congress, President, and Court. These agencies adopt rules having the shape and impact of statutes, mold governmental policy through enforcement decisions and other initiatives, and decide cases in ways that determine the rights of private parties.

Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492-93 (1987).

Likewise, vesting the power of self-interpretation in an agency which has made the law (promulgated the regulation), utterly defeats the procedural safeguards provided in the APA's notice and comment requirement. 5 U.S.C. § 553(b) - (c) (1998).[4] This requirement serves "both (1) 'to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies'and (2) to assure that the 'agency will have before it the facts and information relevant to a particular administrative problem.'" *MCI Telecomm. Corp. v. FCC*, 57 F.3d 1136, 1141 (D.C. Cir. 1995) (quoting *National Ass'n of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983)).

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[4] See App., *infra*, 29a - 30a.

In short, "*Seminole Rock* deference disserves the due process objectives of giving notice of the law to those who must comply with it and of constraining those who enforce it. In these respects, it undermines the rule-of-law values served by the separation of lawmaking from law-exposition." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 669 (1996); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) ("Vague laws offend several important [due process] values. . . . may trap the innocent by not providing fair warning, . . . [and] impermissibly delegate[] basic policy matters to policemen, judges, and juries").

Any constitutional infirmities in the *Seminole Rock* rule are exacerbated by the fact that the vast majority of laws today are in fact made by agencies, versus elected representatives: "For some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far

outnumbered the lawmaking engaged in by Congress through the traditional process." *INS v. Chadha*, 462 U.S. 919, 985-986 (1983) (White, J., dissenting).

Further evidence that the *Seminole Rock* rule should be reexamined comes from the fact that this Court has categorically upheld the separation of powers doctrine in a variety of contexts. In 1983, this Court in *INS v. Chadha*, 462 U.S. 919 (1983), invalidated a "legislative veto" that gave Congress control over a delegation of immigration policymaking authority of the Attorney General. The *Chada* Court held that Congress cannot delegate any legislative power to its own components or agents without violating Article I, Section 7 of the Constitution. In 1986, *Bowsher v. Synar*, 478 U.S. 714 (1986), this Court invalidated the Gramm-Rudman-Hollings Act which called for the President to sequester funds from the budget in accordance with an annual report prepared by the Comptroller General. The Comptroller General was to exercise independent judgment to calculated the necessary budget cuts, based on estimates of

the deficit prepared by other agencies and target deficit levels set by statutes. *Id.* at 717-18. The *Bowsher* Court rejected that scheme and held that Congress could not retain such control over delegated authority, explaining, "The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." *Id.* at 726. In 1991, this Court in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 267 (1991), held that no member of Congress can participate directly in the administration of any federal statute, no matter how trivial the particular exercise of federal involvement might be. Finally, last term this Court invalidated the Line Item Veto Act, holding that it violated the Presentment Clause because that type of Presidential power was "not the product of the 'finely wrought' procedure that the Framers designed" for the enactment of statutes. *Clinton v. City of New York*, 524 U.S. 417, 118 S.Ct. 2091, 2104 (1998).

The instant case leaves no doubt that agencies that operate without any independent check on their interpretative rulemaking are free to draft regulations of "so little color of their own that they can be made to take almost any hue." Max Radin, *Statutory Interpretation,* 43 HARV. L. REV. 863, 884 (1930). Under the decision of the court below, the Forest Service is entitled to promulgate regulations (make the law) and to interpret the regulations, but it is also entitled to adopt rules that say one thing on one occasion and then, on another occasion, interpret the same regulation to mean something else -- and at no point is the court entitled to say what the law is. Indeed, respondent admitted in its brief to the court of appeals that the same regulation, section 251.50(a), may in fact be interpreted by the Forest Supervisor for the Sawtooth National Forest in one way and by the Forest Supervisor for another national forest, in another way.[5] And every interpretation, according to the court

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[5] Federal Appellees' Motion for Summary Affirmance at 11-12, *Everett v. United States* (No. 97-5282) (filed in the United States Court of Appeals

below, requires judicial deference. (App., *infra*, 10a)

In short, respondent's position, upheld by the court below, which concluded that it was required to defer to the agency's interpretation, comes dangerously close to claiming that Forest Service officials may choose whether or not to obey their own regulations – a position that this Court has never sanctioned but one which can be maintained by an agency which is never subject to judicial review. This case points up precisely why this Court should now review the *Seminole Rock* rule and bring it in line with current law and current agency rulemaking practices.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: April 6, 1999

Respectfully submitted,

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for the District of Columbia Circuit).

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT

Frank E. EVERETT, III, Appellant,
v.
UNITED STATES of America, et al., Appellees.
No. 97-5282.

Argued Sept. 28, 1998.
Decided Oct. 30, 1998.

Pilot sought declaratory judgment and injunctive relief against United States Department of Agriculture and Forest Service on grounds that they had arbitrarily and capriciously denied him special use permit to land his helicopter on National Forest System lands. The United States District Court for the District of Columbia, Emmet G. Sullivan, J., 980 F. Supp. 490, entered order granting summary judgment to government, and pilot appealed. The Court of Appeals, Edwards, Chief Judge, held that: (1) Forest Service reasonably interpreted its special use permit regulation to create only a limited exemption for noncommercial recreational activities, and to require special use permit for helicopter landings on National Forest System (NFS) land, and (2) Forest Service's refusal to issue special use permit to allow such use was not arbitrary or capricious.
Affirmed.

*1365 Appeal from the United States District Court for the District of Columbia (No. 95cv00769).
Roger J. Marzulla argued the cause for appellant. With him on the briefs was Nancie G. Marzulla. Rudolph Contreras, Assistant U.S. Attorney, argued the cause for appellees. With him on the brief were Wilma A. Lewis, U.S. Attorney, and R. Craig Lawrence, Assistant U.S. Attorney.

Before: EDWARDS, Chief Judge, WALD and SENTELLE, Circuit Judges.

EDWARDS, Chief Judge:
This case involves a claim by appellant Frank E. Everett ("Everett") that he has a right to land his personal helicopter on National Forest lands. The United States Forest Service ("Service") denied Everett a permit to land his helicopter and forbade him to land without a permit. Everett's attempt to overturn the Service's action was rejected by the District Court and he now appeals.

Service regulations designate "[a]ll uses of National Forest System lands" as "special uses," with the exception of those uses provided for in the regulations governing the disposal of timber and minerals and the grazing of livestock. 36 C.F.R. § 251.50(a) (1998). Under the regulations, "[b]efore engaging in a special use, persons or entities must ... obtain a special use authorization from the authorized officer unless that requirement is waived by paragraph (c) of this section." Id. The regulations exempt from this permit requirement "noncommercial recreational activities such as camping, picnicking, hiking, fishing, hunting, horseback riding, and boating." 36 C.F.R. § 251.50(c).

Everett seeks to land his private helicopter on a three-and-one-half acre parcel of Sawtooth National Forest ("Sawtooth") land that abuts his vacation property in rural Idaho. Everett argues that he is not required to obtain a permit for this use of National Forest System ("NFS") land, because § 251.50(c) exempts his proposed use from the permit requirement. Alternatively, assuming he is required to obtain a permit, Everett argues that the Service's denial of his permit request was arbitrary and capricious, because the decision rested on inappropriate criteria. The Service contends that helicopter landing bears little resemblance to the uses expressly exempted under § 251.50(c) and is,

therefore, prohibited without *1366 a permit under § 251.50(a). The Service denied the permit request in this case based on its determination that Everett's helicopter landing could be accommodated on non-NFS lands, Everett had adequate alternative access to his property, and Everett's proposed use would inure solely to his own benefit at the expense of other uses of the same parcel. Because we find that the Service reasonably interpreted and applied its regulations, we affirm the District Court's grant of summary judgment in favor of the Service.

I. BACKGROUND

Everett owns a vacation home in the Barlow Subdivision in Blaine County, Idaho. His property lies directly adjacent to a three-and-one-half acre parcel of Sawtooth land that is separated from other NFS land by the Big Wood River. A road across Everett's property provides access to this Sawtooth parcel, and the public routinely engages in picnicking and fishing activities there. Everett is a licensed pilot and he would like to land his private helicopter on this piece of land in order to access his property. He initially intended to land the helicopter on his own property; however, county officials notified him in 1993 that use of the property as a private airfield violated a local zoning ordinance. The county suggested that he use Freedman Airport, located 20 miles away, as a landing site. Instead, Everett chose to land his helicopter on the adjacent NFS land that is not directly governed by the zoning ordinance.

On October 16, 1994, Everett's immediate neighbor contacted the Service's Ketchum Ranger District to complain about Everett's helicopter landings on Sawtooth land. Several days later, the Ketchum Ranger District Lands Forester, Carol Brown, informed Everett that he was not authorized to land his helicopter on NFS land. District Ranger Alan Pinkerton then wrote to the Sawtooth Forest Supervisor, Jack E. Bills, expressing concern over "the

potential for uncontrolled use of private aircraft" in the NFS and urging Bills to take control of this activity, as the Service had done with respect to the Sawtooth National Recreation Area. See Appendix ("App.") 131.

Subsequently, on November 2, 1994, Bills issued Special Order No. 04-14-00- 002 ("Order"), pursuant to his authority under > 36 C.F.R. § 261.50(a). The Order prohibited the "[l]anding of aircraft, or dropping or picking up any materials, supplies, or person by means of aircraft, including helicopters, except at established airfields," on all Sawtooth land. App. 9. The Order, which purported to amend certain existing regulations, explicitly exempted from the prohibition persons with permits. Everett attempted to appeal the Order to the Chief of the Service, Jack Ward Thomas. However, on February 3, 1995, a Deputy Regional Forester, Jack A. Blackwell, informed Everett that the Order was not subject to appeal under any Service regulations and advised him instead to apply for a special use permit.

On March 16, 1995, Everett submitted an application to the Ketchum Ranger District for a special use permit to "occasionally land his private helicopter on Federal land next to his property in order to access his vacation home." App. 17. Everett's request anticipated use of the Sawtooth parcel immediately adjacent to his property two to three times per month for several minutes at a time. By letter dated March 27, 1995, District Ranger Pinkerton notified Everett that his application was denied for the following reasons: (1) the proposed use could be reasonably accommodated on non-NFS lands, i.e., the local airport; (2) Everett had adequate alternative access to ensure the reasonable use and enjoyment of his land; and (3) the application did not demonstrate how the proposed use would benefit anyone other than Everett. See App. 25. Pinkerton derived these factors from provisions of Service regulations and the Forest Service Manual ("Manual"). See 36 C.F.R. § 251.54(i)(2) (1998); U.S.

FOREST SERVICE, FOREST SERVICE MANUAL, Special Uses Management § 2703.2 (effective Jan. 25, 1994), reprinted in App. 152. Pinkerton did not cite Bills's 1994 Order in denying Everett's request for a special use permit. Everett then filed a complaint against the Service in District Court, alleging that the 1994 Order issued by Bills was a new regulation that could not be issued without notice and comment, and that denial of his permit *1367 request was arbitrary and capricious. At a hearing on cross-motions for summary judgment, the District Court strongly encouraged the Service to rescind the Order, particularly in light of the Service's position that Everett's proposed helicopter landing was prohibited without a permit regardless of the Order. On August 27, 1996, the Service withdrew the Order "predicated on the fact that the [Service] has sufficient authority to regulate aircraft and helicopter landings on the Sawtooth National Forest without relying on a special order." App. 269.

The withdrawal of the Order mooted Everett's challenge thereto. Accordingly, the District Court requested supplemental briefing on two issues, which became the focus of this litigation: (1) whether or not a special use permit was required for Everett to land a helicopter on Sawtooth land; and (2) whether the Service's denial of Everett's special use permit was arbitrary and capricious. The parties then resubmitted cross-motions for summary judgment.

The District Court granted the Service's motion for summary judgment as to all claims. See Everett v. United States, 980 F.Supp. 490, 491 (D.D.C.1997). The court found that § 251.50(a) required Everett to obtain a special use permit. See id. at 493. The court also found that the Service considered appropriate factors set forth in the regulations and the Manual in denying Everett's application. See id. at 494-96. This appeal followed.

II. ANALYSIS

A. Standard of Review

We review a grant of summary judgment de novo, applying the same legal standard that governed the District Court's determination. See Troy Corp. v. Browner, 120 F.3d 277, 281 (D.C.Cir.1997). Summary judgment is appropriate where the record presents "no genuine issue as to any material fact" and the moving party is entitled to judgment as a matter of law. See id. (quoting Fed.R.Civ.P. 56(c)). We find no genuinely disputed material facts that would preclude summary judgment in this case.

The Service's action can be overturned only if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1994). "[I]n a competition between possible meanings of a regulation, the agency's choice receives substantial deference." Rollins Environmental Serv. Inc. v. Environmental Protection Agency, 937 F.2d 649, 652 (D.C. Cir.1991). Accordingly, the Service's interpretation of its own regulations will prevail unless it is "plainly erroneous or inconsistent" with the plain terms of the disputed regulations. Auer v. Robbins, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (citation omitted). Moreover, the Service's decision to deny the special use permit will survive arbitrary and capricious review unless the agency committed a clear error of judgment or failed to consider appropriate criteria in reaching its decision. See Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989).

B. The Service's Interpretation of the Regulation

The principal questions at issue here focus on the meaning of the regulations set forth at 36 C.F.R. § 251.50(a) and (c). The Service's position is quite simple: § 251.50(a) requires a private user of the NFS to obtain a special use permit before engaging in any activity that is not exempted. The only

exemptions conceivably applicable to Everett's proposed use are those set forth in subsection (c) of § 251.50, for "noncommercial recreational activities such as camping, picnicking, hiking, fishing, hunting, horseback riding, and boating." The listed exemptions do not encompass helicopter use, in the Service's view, because such use "bear[s] little semblance to those limited recreational activities that are explicitly exempted." Brief for Appellees at 12. Everett, in turn, takes a far more expansive view of § 251.50(c), arguing that it excuses all "noncommercial" recreational activities from the permit requirement, and that his proposed use falls within that ambit. See Appellant's Brief at 13; Appellant's Reply Brief at 2.

*1368 We have little trouble concluding that the Service's position reflects a reasonable interpretation of the regulations. Section 251.50(c) can easily be read to create only a limited exemption for noncommercial recreational activities of a similar character to those activities specifically listed. Under this view, it was clearly reasonable for the Service to draw a distinction between helicopter use and the various recreational uses--camping, fishing, and the like--ordinarily contemplated on NFS land. Although helicopter use may facilitate certain back-country recreational pursuits, it is, on its face, readily distinguishable from traditional recreational activities. For one thing, helicopter use is more likely to create a safety hazard to third persons than is, for example, hiking or camping. Moreover, unlike car or snowmobile use, which allows for simultaneous enjoyment of the forest by many users, helicopter use may quite directly displace other uses, by requiring, for safety reasons, the designation of landing sites and air traffic limitations. In short, there are ample legitimate reasons for the Service, based on its expertise, to manage different types of motorized and other forest uses in different ways.

Even assuming the existence of a blanket exemption for noncommercial recreational activities, we do not see how Everett's proposed use of the Sawtooth land falls within that exemption. Everett's proposed helicopter landings would not be "recreational" uses of NFS lands; rather, the landings would be for the sole purpose of facilitating Everett's transportation to his private home off of NFS lands. Specific regulations concerning the use of NFS land to access nonfederal land apply to this situation, providing, in relevant part, that "landowners shall be authorized" access "adequate to secure them the reasonable use and enjoyment of their land," but that "[w]here there is existing access or a right of access ... that is adequate or that can be made adequate, there is no obligation to grant additional access through [NFS] lands." 36 C.F.R. § 251.110(c), (g) (1998). Everett can land his helicopter at an airport located only 20 miles from his home and can also reach his property via public roads. Thus, the Service's resolution of this situation was perfectly consistent with the general regulatory scheme covering uses of NFS lands.

Everett presents several arguments to avoid the result that we reach today. Only three warrant brief discussion here. First, Everett suggests that, in order to impose a permit requirement for helicopter landings on NFS land, the Service had to proceed by notice-and-comment rule making to expressly designate helicopter landing as a "special use." Everett is obviously wrong in this view. As heretofore indicated, Everett's proposed helicopter use is already regulated under a reasonable interpretation of existing rules; thus, the Service need not promulgate a new regulation to cover the activity. Moreover, the Service engaged in an informal adjudication, pursuant to § 251.54 ("Special use applications"), in reviewing Everett's request for a special use permit. Nothing more was required under existing law or regulations. Thus, the Service was not subject to Administrative Procedure Act requirements covering notice-and-comment rule makings or

formal adjudications. See Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 655, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990); Zotos Int'l, Inc. v. Young, 830 F.2d 350, 353 (D.C.Cir.1987).

Second, Everett maintains that a "consistent and longstanding practice of allowing recreational aircraft use of [Sawtooth]" land precludes the Service's present interpretation of § 251.50(c). Appellant's Brief at 19. In support of this contention, Everett cites isolated instances in which helicopter pilots landed their aircraft on Sawtooth land, apparently without special use permits. See App. 423-24, 427-29. It simply cannot follow from this meager evidence, however, that the Service is now foreclosed from enforcing § 251.50. Such an argument is tantamount to saying that police officers can no longer ticket drivers for speeding, because many drivers speed and get away with it. The Service has never established a regulatory position that contradicts the interpretation it now relies upon; therefore, the agency's position must be sustained.

*1369 Finally, Everett contends that the 1994 Order supports his position, because it demonstrates the Service's own understanding that aircraft landings were unregulated prior to its issuance. At oral argument, Everett's counsel made much of the fact that the 1994 Order purported to "amend [ ]" existing regulations. However, we find that Everett's reliance on the 1994 Order is wholly misguided. For one thing, the Order was rescinded by the Service. For another, the 1994 Order was not the agency's final disposition of Everett's claim. The agency's final order in this case was issued in 1995 by District Ranger Pinkerton. And Pinkerton did not rely on the 1994 Order in his 1995 disposition. Therefore, the issuance of the 1994 Order, later rescinded, is of no moment in our consideration of this case, because it is not before us.

Based on the foregoing, we decline to overturn the Service's manifestly reasonable interpretation of § 251.50(a) and (c) to require a special use permit for helicopter landings on NFS land. The agency's interpretation comports with the language of the regulations and advances the legitimate regulatory goal of public safety.

C. The Service's Denial of Everett's Permit Request

Having concluded that the Service reasonably interpreted its regulations to govern Everett's proposed use of the Sawtooth, we next confront Everett's argument that the Service arbitrarily and capriciously denied his request for a special use permit. The Service based its denial on considerations supported by both the regulations and the Manual. See 36 C.F.R. § 251.54(i)(2); U.S. FOREST SERVICE, supra, § 2703.2. Everett now contends that it was improper for the Service to consider factors set forth in the Manual in rendering its decision. We disagree.

Everett relies solely on Western Radio Services Co. v. Espy, 79 F.3d 896 (9th Cir.1996), in which a company challenged the Service's issuance of a special use permit to a competitor company, alleging, inter alia, that the Service failed to follow the guidelines in its Manual. See id. at 900. Western Radio, however, is inapposite. There, the court did not find that the Manual was an inappropriate source of guidance, but rather found that the Manual does "not have the independent force and effect of law." Id. at 901. The Ninth Circuit's holding that a third party cannot sue to require the Service to comply with Manual criteria, see id. at 901-02, does not support Everett's position before this court. To the contrary, Western Radio explicitly acknowledged the Manual's role in establishing "guidelines for the exercise of the Service's prosecutorial discretion." Id. at 901. Thus, in denying Everett's permit request, the Service properly considered criteria articulated in both the regulations and the Manual interpreting those regulations.

In a last ditch effort, Everett also contends that, even if the Service applied the proper criteria in evaluating his permit request, it applied those criteria "incorrectly." Appellant's Brief at 23. This argument, however, is plainly without merit. Everett cannot maintain in earnest that the factors upon which the Service relied do not reasonably support its denial of his application. At bottom, Everett seeks use of the public lands for more convenient access to his own private vacation home--a use that is neither necessary for his enjoyment of his property nor in the public interest. Thus, the Service's conclusion in this regard was not arbitrary and capricious.

III. CONCLUSION

We hold that the Service's interpretation of 36 C.F.R. § 251.50(a) and (c) is clearly reasonable, and that the Service applied appropriate criteria in denying Everett's permit request. Accordingly, the District Court's grant of summary judgment in favor of the Service is affirmed.

So ordered.

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT.

No. 97-5282
September Term, 1998

Frank E. EVERETT, III, Appellant,
v.
UNITED STATES of America, et al., Appellees

BEFORE: Edwards, Chief Judge, Wald and Sentelle, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed December 14, 1998, it is

ORDERED that the petition be denied.

Per Curiam

Dated: January 6, 1999

FOR THE COURT:
Mark J. Langer, Clerk
By: (signature)
Robert A. Bonner
Deputy Clerk

UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA

Frank E. EVERETT, III, Plaintiff,
v.
UNITED STATES of America;
United States Department of Agriculture;
United States Forest Service, Defendants.

Civ.A.No. 95-0769(EGS).
Aug. 5, 1997.

Pilot sought declaratory judgment and injunctive relief against Department of Agriculture and Forest Service on grounds that they had arbitrarily and capriciously denied him special use permit to land his helicopter on National Forest System lands. On cross-motions for summary judgment, the District Court, Sullivan, J., held that: (1) regulation did not exempt noncommercial helicopter landings from special use permit requirements, and (2) agency did not act arbitrarily and capriciously in denying pilot's application for permit to land on National Forest Service land near his vacation home.

Ordered accordingly.

***490** Roger J. Marzulla, Evangeline Paschal, Akin, Gump, Strauss, Hauer & Feld, Washington, DC, for Plaintiff. Rudolph Contreras, Assistant United States Attorney, Washington, DC, for Defendants.

MEMORANDUM OPINION
SULLIVAN, District Judge.

I. INTRODUCTION

Frank E. Everett, III ("plaintiff"), seeks a declaratory judgment and injunctive relief against the United States of

America, the United States Department of Agriculture, and the United States Forest Service ("defendants"), because he contends defendants acted arbitrarily and capriciously in violation of the Administrative Procedure Act ("APA") when they (1) issued a Special Order barring aircraft landings in the Sawtooth National Park in violation of 36 C.F.R. § 251.50 and (2) denied plaintiff a special use permit to land his helicopter in the Sawtooth National Forest.

Plaintiff moved for summary judgment on counts I and II and argued that the issuance of the Special Order was arbitrary and capricious, in violation of the APA. Defendants moved for summary judgment on all counts ***491** and argued that the denial of the special use permit was not arbitrary and capricious within the meaning of the APA. At a hearing before the Court on August 23, 1996, defendants agreed to rescind the Special Order, thereby rendering counts I and II of plaintiff's complaint moot. The Court then reserved its ruling on defendants motion for summary judgment as to count III, i.e., that the Forest Service's denial of plaintiff's special use permit application was arbitrary and capricious.

On September 3, 1996, the Court directed the parties to submit supplemental briefs on the following two issues: (1) whether Forest Service regulation, 36 C.F.R. § 251.50(a), [FN1] requires plaintiff to obtain a special use permit before he can land his helicopter in the Sawtooth National Forest and (2) whether the Forest Service acted arbitrarily and capriciously under the APA when it denied plaintiff's special use permit application. With the issues presented as such, plaintiff now moves for summary judgment on count III.

> FN1. 36 C.F.R. § 251.50(a) explicitly designates all uses of National Forest System lands as "special uses," with the exceptions of those uses governed by regulations for disposal of timber (section 223) and minerals (section 228), and the grazing of livestock

> (section 222). Persons desiring to engage in a "special use" must apply with an authorized officer, for "special use authorization," with the exceptions set forth in section 251.50(c). 36 C.F.R. § 251.50(c) provides, in part, that no special use authorization is required for "noncommercial recreational activities such as camping, picnicking, hiking, fishing, hunting, horseback riding, and boating...." However, even these noncommercial activities may be subject to the permit requirement under section 251.50(c)(1), if "[a]uthorization of such use is required by an order issued pursuant to 36 C.F.R. § 261.50."

Upon consideration of the parties' supplemental memoranda, the Court holds that, under 36 C.F.R. § 251.50(a), a special use permit is required for plaintiff to land his helicopter in the Sawtooth National Park. The Court further holds that the Forest Service did not act arbitrarily and capriciously in violation of the APA when it denied plaintiff's special use permit application. Accordingly, the Court GRANTS defendants' motion for summary judgment as to count III, and DENIES plaintiff's motion for summary judgment as to count III. Therefore, this case is DISMISSED WITH PREJUDICE.

II. FACTUAL BACKGROUND

Plaintiff is a licensed, commercial helicopter pilot who owns a vacation home in Blaine County, Idaho. Plaintiff uses his helicopter for recreational purposes and wants to land near his vacation home. This vacation property is the end lot in the Barlow Subdivision and sits adjacent to a parcel of land that is administered by the Forest Service as part of Sawtooth National Forest. This three and one-half acre parcel is separated from other Forest Service property by the Big Wood River.

A Blaine County Zoning Ordinance prohibits aircraft landings on the Barlow Subdivision, and consequently makes it unlawful for plaintiff to land his helicopter on his property. The parties do not dispute that, notwithstanding this Ordinance, plaintiff can land his helicopter at the Freedman Airport located 20 miles from plaintiff's house. Plaintiff contends that the law supports his use of a more feasible alternative--to land his helicopter in the Sawtooth National Forest on the parcel of land adjacent to his home.

On October 16, 1994, plaintiff's adjoining neighbor, Joan Anwalt, complained to the District Ranger on the Ketchum Ranger District at Sawtooth National Forest about plaintiff's helicopter landings on the Sawtooth Forest land. As a result of Anwalt's complaint, the Sawtooth Forest Supervisor, Jack E. Bills, issued a Special Order, pursuant to 36 C.F.R. § 261.50(a), [FN2] that barred aircraft landings in the Sawtooth National Forest. On December 19, 1994, plaintiff appealed to the U.S. Department of Agriculture. In response to this appeal, plaintiff was informed by a Deputy Regional Forester, on February 3, 1995, that the Special ***492** Order was not subject to appeal under any Forest Service regulation.

> FN2. 36 C.F.R. § 261.50(a) provides, in part, that "each Forest Supervisor may issue orders which close or restrict the use of described areas within the area over which he has jurisdiction."

On March 16, 1995, plaintiff filed an application for a special use permit with the District Ranger of the National Forest System. Plaintiff specifically requested authorization to land his helicopter in the Sawtooth National Forest for only two or three times a month during the daylight hours. In a letter dated March 27, 1995, District Ranger Alan Pinkerton denied plaintiff's application for special use authorization to land his helicopter in the Sawtooth National Forest. Plaintiff

subsequently commenced this action.

III. STANDARD OF REVIEW

Pursuant to section 706(2)(A) of the APA, this Court is authorized to review an agency decision of the United States Forest Service ("Forest Service"). See 5 U.S.C. § 706(2)(A). In doing so, the Court should afford "considerable weight" to the Forest Service's findings and its construction of the "statutory scheme it is entrusted to administer." See Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844-45, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984). Thus, the Court will set aside an agency determination only if it is arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law. See International Bhd. of Teamsters v. United States, 735 F.2d 1525, 1534 (D.C.Cir.1984).

In ruling on cross-motions for summary judgment, the Court shall grant summary judgment only if one of the moving parties is entitled to judgment as a matter of law upon material facts that are not genuinely disputed. Rhoads v. McFerran, 517 F.2d 66, 67 (2d Cir.1975); see 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 56.13, at 56-171 (2d ed.1994). The Court finds that the cross-motions for summary judgment present no genuinely disputed material facts which would preclude summary judgment.

IV. DISCUSSION

A. Special Use Authorization

Plaintiff's argument that 36 C.F.R. § 251.50 does not obligate him to obtain a special use permit to land his helicopter within the Sawtooth National Forest is essentially two-fold. First, he maintains that the Forest Service has not issued any regulations that are subject to notice and comment

rulemaking, which specifically proscribe non-commercial helicopter landings in the Sawtooth National Forest. Second, plaintiff argues that his helicopter use has not been prohibited by section 251.50 because other non-commercial helicopters and aircrafts, i.e., seaplanes, repeatedly land without a permit in the Sawtooth National Forest. In essence, plaintiff's contentions are based on the premise that section 251.50 only exempts non-commercial recreational use of helicopters from permit authorization procedures. As explained in this Opinion, the Court is not persuaded by plaintiff's argument, and holds that under section 251.50, special use authorization is required for plaintiff to land his helicopter in the Sawtooth National Forest to access his vacation home.

1. Defendants' Authority to Prohibit Helicopter Landings

Plaintiff first contends that the Forest Service has not promulgated a regulation, subject to notice and comment rulemaking, which specifically prohibits helicopter landings in the Sawtooth National Forest. He also alleges that defendants applied a novel interpretation of the regulations in this case to his detriment. Specifically, plaintiff argues that defendants' reliance on section 251.50 to prohibit recreational helicopter landings in the Sawtooth National Park is flawed because that regulation does not explicitly proscribe non-commercial recreational helicopter landings in the Sawtooth National Park. Plaintiff essentially challenges the Forest Service's authority under section 251.50(a) to require special use permits for the activity.

In response to plaintiff's contentions, defendants persuasively argue that Congress has delegated its power over public lands to the Secretary of Agriculture and to the Forest Service. See Kleppe v. New Mexico, 426 U.S. 529, 539, 96 S.Ct. 2285, 2291-92, 49 L.Ed.2d 34 (1976). Defendants contend that as an exercise of this power, they have promulgated regulations pertaining to appropriate ***493** usage of the National Forest

System. See 36 C.F.R. § 251.50. That regulation provides that "[a]ll uses of National Forest System lands ... except those provided for in the regulations governing the disposal of timber and minerals and the grazing of livestock, are designated special uses." 36 C.F.R. § 251.50(a) (emphasis added). Further, a person must obtain a special use permit from an officer before engaging in a special use. Id. Section 251.50(c) exempts "noncommercial recreational activities such as camping, picnicking, fishing, horseback riding, and boating" from the special use permit requirement. 36 C.F.R. § 251.50(c). Section 261.70(a)(7) also provides that "each Regional Forester ... may issue regulations prohibiting acts or omissions within all or any part of the area over which he has jurisdiction for the following purpose[ ]: public safety." 36 C.F.R. § 261.70(a)(7).

[1] Plaintiff's argument is flawed because he incorrectly interprets section 251.50 to mean that special use permits are only required for commercial recreational activities. Plaintiff relies on United States v. Patzer, 15 F.3d 934 (10th Cir.1993), to contend that the only reasonable understanding of 36 C.F.R. § 251.50 is that special use permits are required for all commercial activities. Plaintiff refers to the statement made by the Tenth Circuit that "[p]rior to and after ... 1988 ... special-use authorization was required for commercial outfitting on [National Forest Service System] lands." Id. at 943.

In the Court's view, plaintiff's reliance on Patzer is misplaced. In Patzer, the plaintiff was charged with violating 36 C.F.R. § 251.50(a) by engaging in a commercial activity--outfitting and filming motion pictures-- without a special use permit. The Tenth Circuit upheld plaintiff's conviction for conducting commercial operations in the National Forest on the grounds that plaintiff was not using the land for the purposes of grazing livestock, nor for the disposal of timber or minerals in accordance with the specific

language of the Forest Service regulation. Id. at 938. Thus, the circuit court did "not distinguish between commercial and non-commercial uses." Defs.' Reply to Pl.'s Suppl.Mem.P. & A. at 6; see Patzer, 15 F.3d at 938-40. Rather, the circuit court looked at the plain meaning of the regulations to determine whether plaintiff's use required a special use permit. Patzer, 15 F.3d at 938-40.

[2] Furthermore, contrary to plaintiff's assertions, defendants' interpretation of section 251.50 is reasonable. First, the specific language, "such as," limits the scope of non-commercial recreational activities under this exemption to those activities that are similar to camping, picnicking, fishing, and horseback riding. 36 C.F.R. § 251.50(c). Moreover, Congress' failure to exempt all non-commercial recreational activities demonstrates its intent to limit the scope of activities that would be exempt from special use authorization. Giving deference to both the plain meaning of sections 251.50(c) and 261.70(a)(7), and the Forest Service's expertise in determining what activities are indeed recreational, defendants rationally concluded that, unlike other recreational uses, plaintiff's helicopter use involved greater safety risks than the aforementioned exempt activity, and that plaintiff could still operate his helicopter on non-forest grounds in close proximity to his vacation home.

2. Non-Commercial Aircraft Recurrent Landings in the Sawtooth National Forest

[3] Plaintiff further claims that the general public, other helicopter pilots, and even he, shared common knowledge that noncommercial helicopters "repeatedly" land in the Sawtooth National Forest without a permit, and, as such, a special use permit is not required for him to land his helicopter in the forest. Plaintiff attempts to buttress his argument by pointing out that the Sectional Aviation Map, which was created to inform pilots where they could land,

did not even indicate that non-commercial helicopters required a permit to land in that area. Plaintiff also refers to the declaration of Richard A. Dominy, a helicopter pilot and aviation consultant, in which Dominy states that a Forest Ranger permitted him to land anywhere within the Forest without a permit, ***494** except for in the Wilderness and Recreation Areas. Dominy Decl. ¶ 3. [FN3]

> FN3. Defendants, in turn, respond that Mr. Dominy's assertions do not comport with agency practice. Defendants argue that if Forest Service personnel informed Mr. Dominy that landing in the Forest is unrestricted, those personnel misunderstood agency policies. Moreover, defendants maintain that during the time when Dominy claims he operated his helicopter on Forest grounds for filming purposes, this use of a helicopter may actually have been authorized by a special permit (for filming) issued to the filming company, without him being aware of it. Defs.' Reply Pls.' Supp.Mem.P. & A. at 7-8.

Defendants do not refute plaintiff's claim that the Federal Aviation Map makes no reference to a prohibition of helicopter landings in its Sectional Aviation Map. Rather, defendants point to the fact that the landing of aircraft has generally been prohibited on Forest Service lands or waters. Aeronautical Info. Manual, § 7-4-8, reprinted in U.S. Dep't of Transp.Regs., Fed. Aviation Regs. and Aeronautical Info. Manual (1996); see Defs.' Supp.Br.Supp.Mot.Summ.J. at 6-7. [FN4] Defendants also concede that the Forest Service does in fact authorize certain helicopter landings without a permit in the Sawtooth National Forest that "are in support of the agency's mission," i.e., fire-fighting or contract helicopter landings. Therefore, defendants reasonably concluded that plaintiff's proposed use of the forest land to access his vacation home does not fall within the scope of authorized agency helicopter landings.

> FN4. The Court is aware that the Aeronautical Information Manual provisions simply re-state what the Forest Service regulations already require for landing aircraft on National Forest Service lands, and are not independent sources of authority.

Further, plaintiff argues that, because seaplanes and snowmobiles are allowed in the park without a permit, his helicopter use should not require a special use permit. The Court also rejects this argument. First, seaplanes are not in fact afforded carte blanche use of the National Forest grounds. Rather, as defendants point out, (1) seaplanes are relegated to designated landing areas and (2) both seaplanes and helicopters require authorization. Defs.' Suppl.Br.Supp.Mot.Summ.J. at 8-10; see generally Aeronautical Info. Manual, § 7-4-8, reprinted in U.S. Dep't of Transp.Regs., Fed. Aviation Regs. and Aeronautical Info. Manual (1996); Seaplane Pilots Association, Water Landing Directory 68 (4th ed.1996), reprinted in Defs.' Suppl.Br.Supp.Mot.Summ.J., Ex. E.

Second, defendants rationally distinguish plaintiff's use of his helicopter from seaplane landings and snowmobile use. Unlike seaplanes, which land on isolated, designated bodies of water, plaintiff's use would require the Forest Service to designate a specific parcel of land to be a landing field solely for his personal non-commercial use. Defendants further argue that helicopter landings pose much greater risks than snowmobiling, see generally Defs.' Suppl.Br.Supp.Mot.Summ.J. at 10-12, and generally require other uses of the forest land to be excluded, Forest Service Manual 2727.11, reprinted in Defs.' Suppl.Br.Supp.Mot.Summ.J., Ex. B. Thus, the Forest Service reasonably concluded that a special use permit is required for plaintiff to land his helicopter in the Sawtooth National Park in light of the fact that plaintiff's use would cause greater

safety risks, would require designating a specific parcel of land just for plaintiff's private helicopter landings, and would generally preclude recreational uses of that land. See id.; Defs.' Suppl.Br.Supp.Mot.Summ.J. at 5-10.

B. The Agency's Denial of Plaintiff's Special Use Permit

[4] Plaintiff's final claim is that the Forest Service's refusal to issue him a special use permit was arbitrary and capricious. On March 27, 1995, the Forest Service denied plaintiff's special use permit application on the persuasive grounds that the proposed use was not in the public interest. The Forest Service based its determination on the following three reasons: (1) plaintiff's use of the Sawtooth National Forest to land his helicopter could be reasonably accommodated by using non-National Forest Systems lands; (2) plaintiff's less expensive use of the Forest and the convenience to him was an insufficient justification for his use of the National Forest lands; and (3) plaintiff ***495** would be the only person to benefit from landing his helicopter in the Sawtooth National Forest to access his property. See Letter from Pinkerton to Marzulla, of 3/27/95, reprinted in Mem. of P. & A. Supp.Defs.' Mot.Summ.J. and Opp'n to Pl.'s Mot. Partial Summ.J., Ex. 9; Forest Service Manual 2700, reprinted in Mem. of P. & A. Supp.Defs.' Mot.Summ.J. and Opp'n to Pl.'s Mot. Partial Summ. J., Ex. 10.

Specifically, plaintiff argues that Deputy Regional Ranger, Alan Pinkerton, disregarded the six criteria specifically set forth in section 251.54(i) when he denied plaintiff's permit application. [FN5] Plaintiff argues that Ranger Pinkerton relied solely on the Forest Service Manual ("Manual"), which was never promulgated as a regulation and, therefore, Pinkerton did not have a legal basis to support his decisions. As support for his argument that defendants relied on a "consideration of irrelevant factors," plaintiff relies on the decision in Western Radio Serv. Co. v. Espy, 79 F.3d 896

(9th Cir.1996), cert. denied, --- U.S. ----, 117 S.Ct. 80, 136 L.Ed.2d 38 (1996).

> FN5. The six criteria set forth in 36 C.F.R. § 251.54(i) are as follows: (1) the proposed use would be inconsistent or incompatible with the purposes for which the land is managed; or (2) the proposed use would not be in the public interest; or (3) the applicant is not qualified; or (4) the use would otherwise be inconsistent with applicable Federal and State law; or (5) the applicant does not or cannot demonstrate technical or financial capacity; or (6) there is no person or entity authorized to sign a special use authorization. Plaintiff concedes that all but factor two are inapplicable to his case.

For the following reasons, the Court is not persuaded by plaintiff's argument and concludes that the Forest Service was not arbitrary and capricious in denying plaintiff a special use permit to land his helicopter in the Sawtooth National Forest.

1. Reliance on the Forest Service Manual

Essentially, plaintiff's argument fails for the following reasons. First, plaintiff mischaracterizes the holding in Western Radio. In Western Radio, the plaintiff argued that the Forest Service Manual had the independent force and effect of law. Western Radio, 79 F.3d at 901. In that case, the plaintiff further argued that the Forest Service acted arbitrarily and capriciously by failing to comply with the provisions set forth in the Forest Service Manual when it issued a special use permit. Id. at 900-01. The Ninth Circuit upheld the Forest Service's determination on the grounds that the Forest Service Manual did not have the independent force and effect of law and, therefore, was not binding authority. Id. at 901. Plaintiff incorrectly interprets Western Radio's

holding to mean that the Forest Service can not refer to or use the Manual to interpret the language of the regulations. Defendants argue, and the Court concurs, that Western Radio only stands for the proposition that the Forest Service is not obligated to use the Manual when considering a special use permit application.

Further, the Ninth Circuit's interpretation of Western Radio is consistent with the Forest Service Manual's requirements set forth in section 251.54(i). In Western Radio, the Court explicitly stated, "in dictum we explained that 'the Forest Service Manual merely establishes guidelines for the exercise of the Service's prosecutorial discretion....' " Id. at 901 (quoting United States v. Doremus, 888 F.2d 630, 633 n. 3 (9th Cir.1989)). As applied to the present case, the District Ranger used the Manual to "provide[ ] guidance regarding the denial criteria at 36 C.F.R. § 251.54(i)." Defs.' Suppl.Br.Supp.Mot.Summ.J. at 13. Therefore, the District Ranger reasonably relied on the Manual to determine whether plaintiff's use was in the public interest.

2. Forest Service's Reliance on Regulations

Second, plaintiff's argument that Ranger Pinkerton did not rely on regulations in 36 C.F.R. § 251.54(i) to deny plaintiff's special use permit, is not persuasive. The record clearly demonstrates that Pinkerton based his decision on section 251.54(i)(2) of the Forest Service regulations, which states that "[a]n authorized officer may deny issuance of an authorization for all other special uses ... if that officer determines that ... [t]he proposed use would not be in the public interest." See Letter from Pinkerton to Marzulla, ***496** of 3/27/95, reprinted in Mem. of P. & A. Supp.Defs.' Mot.Summ.J. Opp'n to Pl.'s Mot. for Partial Summ. J., Ex. 9. In addition, Pinkerton cited to the Manual, which has been issued pursuant to 36 C.F.R. § 200.4, and thus he reasonably relied on the Code of Federal Regulations for determining

whether plaintiff's helicopter landings in the Sawtooth National Forest would be in the public interest. See 36 C.F.R. § 251.54(i)(2).

Further, the explicit language of 36 C.F.R. § 251.110(g) provides that the Forest Service is not obligated "to grant additional access through National Forest System lands," where "there is existing access or a right of access to a property over non-National Forest land or over public reads that is adequate or that can be made adequate." Indeed, plaintiff does not even contest the District Ranger's findings that other alternatives such as the Wood River Valley Airport, State Highway 75, and Barloe Road are within plaintiff's service area to afford him "reasonable use and enjoyment of [his] land." 36 C.F.R. § 251.110(c). Therefore, the Forest Service reasonably concluded that plaintiff should be denied the special use permit.

3. Reasonableness of the Forest Service's Decision

Finally, plaintiff argues that the Forest Service acted arbitrarily and capriciously by concluding that plaintiff's use of the Sawtooth National Forest was not in the public interest because only plaintiff benefited from landing his helicopter in the Forest. The Court is not persuaded. Plaintiff specifically points to the fact that other activities, such as baseball games and picnicking, solely benefit one person but are still considered to be in the public interest. Plaintiff posits that helicopters in general provide a valuable function, and further argues that his use of the Sawtooth National Forest should also be considered to be in the public interest.

Plaintiff's use of the land as an "easement" to access his property is easily distinguishable from activities such as picnicking and baseball games and even other authorized aircraft landings, as previously discussed by the Court in this Opinion. Further, plaintiff's use is distinguished because

helicopter landings raise safety concerns, and several alternative landing sites already exist. Contrary to plaintiff's contention, the Forest Ranger also found that plaintiff's use would exclude other members of the public from using the Forest to the point that the Forest Service "would be required to designate the parcel of National Forest System land as a designated heliport," that would preclude all other uses for safety reasons. Letter from Pinkerton to Marzulla, of 3/27/95, reprinted in Mem. of P. & A. Supp.Defs .' Mot.Summ.J. and Opp'n to Pl.'s Mot. for Partial Summ.J., Ex. 9; see also Forest Service Manual 2727.11, reprinted in Defs.' Suppl.Br.Supp.Mot.Summ.J., Ex. B. Upon consideration of the Forest Service's expertise in determining appropriate land uses, the Court holds that the Forest Service reasonably denied plaintiff's special use permit application because plaintiff's use of the Sawtooth National Park to land his helicopter would not be in the public interest.

V. CONCLUSION

In view of the foregoing, defendants' motion for summary judgment as to count III of plaintiff's complaint is GRANTED. Plaintiff's motion for summary judgment as to count III of plaintiff's complaint is DENIED. An Order will issue with this Opinion.

CODE OF FEDERAL REGULATIONS
Title 36 - Parks, Forests, and Public Property
Chapter II - Forest Service, Department of Agriculture
Part 251 - Land Uses
Subpart B - Special Uses

36 C.F.R. § 251.50 - Scope

(a) All uses of National Forest System lands, improvements, and resources, except those provided for in the regulations governing the disposal of timber (part 223) and the grazing of livestock (part 222), are designated "special uses." Before engaging in a special use, persons or entities must submit an application to an authorized officer and must obtain a special use authorization from the authorized officer unless that requirement is waived by paragraph (c) of this section.

(b) Nothing in this section prohibits the temporary occupancy of National Forest System land for the protection of life or property in emergencies, if a special use authorization for such use is obtained at the earliest opportunity.

(c) A special use authorization is not required for noncommercial recreational activities such as camping, picnicking, hiking, fishing, hunting, horseback riding, and boating, as well as noncommercial activities involving the expression of views such as assemblies, meetings, demonstrations, and parades, except for: (1) Authorization of such use is required by an order issue pursuant to 36 C.F.R. 261.50; (2) Authorization of such use is required by a regulation issued pursuant to 36 C.F.R. 261.70; (3) Noncommercial group use as defined in §251.51 of this subpart.

(d) Unless otherwise required by order issued under §261.50 or by regulation issued under §261.70 of this Chapter, the use of existing forest development roads and trails does not require a special-use authorization; however, any such use is subject to compliance with all Federal and State laws governing the roads or trails to be used.

UNITED STATES CODE ANNOTATED
Title 5 - Government Organization and Employees
Part 1 - The Agencies Generally
Chapter 5 - Administrative Procedure
Subchapter II - Administrative Procedure

§ 553 - Rule making

(A) This section applies, according to the provisions thereof, except to the extent that there is involved -
(1) a military or foreign affairs function of the United States; or
(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are names and either personally served or otherwise have actual notice thereof in accordance with the law. The notice shall include -
(1) a statement of the time, place, and nature of public rule making proceedings;
(2) reference to the legal authority under which the rule is proposed; and
(3) either the terms of substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearings is required by statute, this subsection does not apply -
(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issues) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule

making through submission of written date, views, or arguments with or without opportunity for oral presentation. after consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) the required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except -
(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
(2) interpretative rules and statements of policy; or
(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.